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In the Supreme Court of the United States

OCTOBER TERM, 1941

JOHN C. GETZ ET AL.,
Petitioners,

V.

TOWN OF BELLEAIR,
a Municipal Corporation,
Respondent.

TOWN OF BELLEAIR,
a Municipal Corporation,
Cross-Petitioner,

V.

JOHN C. GETZ ET AL.,
Cross-Respondents.

Cross-Petition of Town of Belleair for Writ of Certiorari to the United States Circuit Court of Appeals of the Fifth Circuit and Brief in Support Thereof.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your cross-petitioner, Town of Belleair, a municipal corporation, prays that writ of certiorari issue to review the final judgment of the United States Circuit Court of Appeals of the Fifth Circuit entered on June 2, 1941 (petition for rehearing denied July 2, 1941), in that certain cause wherein John C. Getz, R. P. Lyman, Jr.

and Daniel W. Goodenough were appellants and Town of Belleair, a municipal corporation, was appellee, and from which judgment the said appellants have petitioned this Court for writ of certiorari and have filed the record in this Court. The said final judgment reversed a judgment of the United States District Court for the Southern District of Florida and remanded the cause for further proceedings.

A Short Statement of Matters Involved

John C. Getz et al. sued your cross-petitioner in the United States District Court for the Southern District of Florida upon past-due coupons representing interest on so-called "Public Improvement Bonds" purporting to have been issued by the Town of Belleair Heights on July 1, 1924, and in the alternative, if the bonds are held void, for money had and received, in that the Town received the money for the bonds and used it in the construction of public improvements

After an answer setting up certain defenses had been interposed an "Additional Defense" was filed (R. 55 et seq.), which set up that a suit had been brought in the Florida courts by citizens and taxpayers of the Town to enjoin the levy or collection of any further tax to pay any of three named bond issues of the Town, that the lower court had rendered a final decree of injunction in accordance with the prayer of the complaint, that the Supreme Court of Florida had first affirmed said judgment by an equal division of the Judges but, after several rehearings, finally affirmed said judgment as to the "Public Improvement Bonds" (the $300,000 bond issue, of which the bonds held by Getz and his associates are a part) and reversed the lower court as to the two issues of paving bonds in-

volved in the said litigation. *Olds et al v. Alvord et al.,* 191 So. 434), and averred that the Florida court had decided that the proceeds of the bonds were used for private purposes and not for the public purposes of the Town, and that said question of fact, having once been decided, could not be re-examined. The defendant then moved the District Court to enter a summary judgment in its favor (R. 68).

The District Court, on the first argument, denied said motion (R. 143) upon the ground that

> ". . . since the plaintiffs herein were not named as defendants in the said suit in the State Court and were not served with process therein but were proceeded against as members of a class under Section 14 of the Florida Chancery Act of 1931, they are not bound by the judgment of the State Court holding that the proceeds of the said bonds were used for the benefit of private corporations and not for public purposes of the Town of Belleair."

Shortly after this ruling the case of *Hansberry et al v. Lee et al.* (61 S. Ct. 115, reported in Advance Sheet of Dec. 1, 1940) was published, and on petition for rehearing the District Court reversed its ruling and entered summary judgment in favor of the defendant (R. 146). The District Court found:

> "That the State Court determined and finally adjudged that the proceeds of the bonds sued upon in this cause were used for the benefit of private corporations and not for public purposes of the Town of Belleair";

also:

> "That, in the suit by property owners in the State Court to enjoin the officials of the Town from collecting taxes that had been assessed and were then

unpaid and from making further assessments against the properties in the Town to pay the bonds involved in this action, the plaintiffs, John C. Getz, R. P. Lyman, Jr. and Daniel W. Goodenough, were not made defendants by name, but other holders of similar bonds were named as defendants in their own right and as members of a class—to wit, the holders of similar bonds— and appeared and vigorously defended said action in the State Court, wherein it was adjudged that the bonds were issued, and the proceeds thereof used, for the benefit of private corporations, and that a tax could not be levied against the property in the Town to pay the same. The said proceeding in the State Court against the plaintiffs herein as members of a class was regularly conducted according to the laws of Florida, hence the judgment of the State Court is conclusive upon the plaintiffs as against a claim for money had and received."

The plaintiffs, Getz et al., appealed, and the Circuit Court of Appeals held that

> "Even if the decree in Olds v. Alvord binds this appellant as a class party, it did not adjudicate the use of the proceeds for the benefit of private corporations, as we held in Olds v. Town of Belleair, supra."

The Olds case referred to is reported in 120 Federal (2) 494, Advance Sheet of July 21, 1941, and holds in effect that while the State courts, both Circuit and Supreme, had held that the proceeds of the bonds were used for private purposes, that issue dropped out of the case and was not carried forward in the last decree of the Circuit Court rendered after the case was finally remanded by the State Supreme Court, which decree it held "superseded the other." The facts upon which this holding is based are stated in the "Additional Defense," the supporting affidavits and exhibits attached

thereto (R. 55 et seq.) and the official opinions of the Supreme Court of Florida, viz:

A suit was first brought to validate refunding bonds,

State v. Town of Belleair, 125 Fla. 669, 170 So. 434, in which the Florida Supreme Court said:

> "It was also shown that the $300,000 issue dated July 1, 1924, was for the purpose of 'constructing wharves, ship channels, drive ways, parks, and boulevards in the Town of Belleair Heights,' but that in fact $254,745.64, or more than five-sixths, of it was used for improving the water front (bulkheading and filling in) adjacent to Bellevue-Griswold Hotel Company property; and that the balance was used for a like purpose in front of Coe's property, Coe's road, Wick's property, and the property of Belleair Estates, Inc."

This opinion reversed the decree of the lower court validating refunding bonds, and immediately the taxpayers of the Town brought the suit which culminated in the opinion in *Olds v. Alvord,* 191 So. 434, to enjoin the collection of taxes to pay the bonds, in which the Circuit Judge said:

> "The Court finds that the primary object of these issues and the appropriation of the proceeds of these issues was to benefit the property of either Belleair Estates, Inc., or Bellevue-Griswold Hotel Company, or both, each being a chartered Company of the State or a corporation.
>
> "This Court finds from the evidence that out of the proceeds of one or more of these bond issues part of the Indian Rocks Road was paved. Special reference is made to this particular improvement for it is the only instance where there was an application of proceeds from any of these bond issues to an enterprise, which at the time came under the

> classification of a public benefit. This paving was done on a road which is a connecting link between Clearwater, points north, and Indian Rocks, and was and is much used by the public. This fact, however, cannot alter the finding hereinabove made for the public benefit here noted is comparatively slight and merely incidental." (R. 64.)

The money used on the Indian Rocks road was from an issue of bonds for paving purposes, which is not here involved.

The Florida Supreme Court, by an equal division of its Judges, first affirmed the lower court's decree enjoining the levy of a tax to pay any of the bonds (183 So. 711); then, after several rehearings, the final opinion by a majority of the Court held that the two bond issues for paving purposes could not be held invalid, because the Town was authorized to issue them and the validating decree foreclosed all questions as to the regularity of the proceedings and purpose of the issue, but that the $300,000 bond issue, "Public Improvement Bonds", was void ab initio, because the Town of Belleair Heights, the predecessor of the Town of Belleair, did not have power to issue them (191 So. 434). In said final opinion the Supreme Court said:

> "It so happens that the proceeds of this $300,000 issue was used for building a sea wall and making other improvement which were chiefly beneficial to a private corporation."

The Florida Supreme Court finally *affirmed* the decree appealed from so far as it affected

> ". . . *the proposed tax to be levied and assessed to produce funds from which to pay the principal and interest on the $300,000 bond issue,*"

which was the only relief prayed for and the only relief

granted by the lower court as to said bond issue, but reversed the decree as to the other bond issues and remanded the cause,

> ". . . . with directions that a decree be forthwith entered not inconsistent with the views herein expressed" (191 So. 450).

When the case came back the Circuit Judge entered another decree, in which he dismissed the bill of complaint as to the paving-bond issues, and as to the said $300,000 bond issue for "public purposes" said:

> "That the said $300,000 issue of Public Improvement Bonds issued by the Town of Belleair Heights, dated July 1, 1924, for money received by said Town and used in the construction of sea walls are void ab initio."

This latter decree of the Circuit Court appeared in the record before the Circuit Court of Appeals in the Olds case, but does not appear in the record in the Getz case now before this Court.

It is made plain by the "Additional Defense" (R. 55 et seq.), the affidavit supporting the Motion for Summary Judgment (R. 69 et seq.) and the exhibits made a part of the defense and affidavit that in the said litigation in the State Court brought by the taxpayers seeking to enjoin the levy of a tax to pay the bonds, two major grounds were relied upon as to the $300,000 bond issue, namely:

(a) That the Town had no power to issue them, and

(b) That they were issued for the benefit of private corporations, contrary to Section 7, Article IX, of the Constitution of Florida (see pars. III and IV of the bill of complaint, R. 74 et seq.),

and that the latter ground only was relied upon as a

major ground why a tax could not be collected to pay the paving bonds (see par. V of the bill of complaint, R. 81 et seq.). The lower court based his injunctional order as to all the bonds on ground (b) (R. 42 et seq.) and made no mention of ground (a). Probably he was actuated by the Supreme Court's holding in 170 So. 434 that the bonds were void as having been issued for private purposes.

After this decree was affirmed by an evenly divided court it was on rehearing reversed, as above shown, as to the paving bonds upon the sole ground that the validating decrees had precluded a further examination of the validity of those bonds, but was affirmed as to the $300,000 bond issue upon the theory that, since the Town had no power at the time of this issue to issue bonds at all, the bonds were void ab initio and the validating decree was a nullity. The stated procedure in the State court is the sole basis of the holding of the Circuit Court of Appeals that

> ". . . the issue as to the private object and use of proceeds of these bonds dropped out of the case and was unnecessary to be considered and was in fact not decided in this final decree,"

(referring to the decree of the Circuit Court of Pinellas County dated March 12, 1940, entered after the cause was finally remanded,) and of its further holding that the State court

> ". . . did not adjudicate the use of the proceeds for the benefit of private corporations."

Cross-petitioner's contention on this holding will be stated in the brief appended hereto.

Basis of the Supreme Court's Jurisdiction

This Court is expressly given jurisdiction by Section

240 of the Judicial Code, 28 U. S. C. A., Sec. 347, to review by certiorari judgments of the circuit court of appeals. It also has jurisdiction to entertain cross-petitions for writs of certiorari.

> *Hubbard v. Tod,* 171 U.S. 474, 19 S. Ct. 14, 43 L. Ed. 246.

See also:

> Jurisdiction of Supreme Court, Robertson & Kukham, Sec. 398; Note 30, Sec. 347, Title 28, U. S. C. A.

Such petitions may be entertained within three months after the petition for rehearing in the lower court was denied, which was July 2, 1941.

> *Citizens Bank of Michigan City v. Opperman,* 249 U. S. 448, 39 S. Ct. 330.

Questions Presented

This cross-petition for certiorari involves and presents the questions whether the Circuit Court of Appeals has not refused to be bound by and to observe and follow a decision and determination of a question of fact duly litigated and decided by the Supreme Court of the State of Florida which the law of Florida makes conclusive, and whether it has not directed the District Court to retry and relitigate a question of fact tried and finally determined by the Florida courts, and these questions constitute the reasons relied on for the allowance of the writ of certiorari herein prayed.

Prayer for Writ of Certiorari

Wherefore, your cross-petitioner prays that a writ of certiorari be issued under the seal of this Court, directed to the United States Circuit Court of Appeals of the